COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Are the federal courts free to reject the standard for the review of second habeas petitions adopted by Congress, which is presently embodied in 28 U.S.C. § 2244(b) and Rule 9(b), and to adopt a new standard responsive to supposed policy concerns that Congress has considered and rejected?

2. Should a mandatory rule be adopted to bar all claims omitted from an initial federal habeas petition, or is the substantial discretion presently vested in the federal district courts—which empowers them summarily to dismiss second habeas petitions when applicants have deliberately withheld claims or acted with inexcusable neglect—adequate to deal with abuses of the writ?

3. Should an indigent, death-sentenced habeas applicant—initially represented by a volunteer attorney who openly refused to raise several substantial constitutional claims on his behalf—be deemed to have abused the writ when he promptly sought to amend his initial federal petition as soon as he was able to retain new counsel?

4. Should a district court—which has already acknowledged that uncorrected errors in respondent's presentence report "materially altered the profile before the sentencing judge," and created "sufficient likelihood that a wrongful sentence was imposed based on inadequate information"—be allowed to consider on remand whether the "ends of justice" require respondent's challenges to the presentence report to be determined on their merits?

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STATEMENT OF FACTS

I. The Trial Proceedings

A. The Crime

At the time of the crime, William Neal Moore was a 22-year-old black soldier who had recently been transferred from a post in West Germany to Fort Gordon, Georgia. (J.A. 101-02). While undergoing a six-month hospitalization (*id.*), Mr. Moore learned that his wife, who had refused to follow him to Ft. Gordon, had fallen in "with another man who was rumored to be involved in prostitution, drugs and stealing." (J.A. 198-199).

In late February, 1974, after leaving the hospital, Mr. Moore returned to his wife's Columbus, Ohio home, assumed full responsibility for the couple's two-year-old child, Billy Jr.—who "had been found wandering outside on the street in the cold," abandoned by his mother (J.A. 199)—and brought the child to Ft. Gordon. Mr. Moore moved off the base, gave up his responsibilities as a squad leader, and began caring for his son while attempting to maintain his other military duties. (*Id.*).

Because Mr. Moore had previously instructed Army paymasters to send all but $50 per month of his military pay to his wife, he found himself without sufficient funds to cover off-base expenses for himself and the child. (J.A. 198-99). At the time of the crime, Mr. Moore had borrowed $250 from the Red Cross and was seeking another $250 Red Cross loan. (J.A. 199).

Mr. Moore had became acquainted with many local citizens of the nearby black community of Wrens, Georgia through another Ft. Gordon marine, George Curtis, who was from Wrens. (J.A. 211-212). On the weekend of April 2, 1974, Mr. Moore traveled to Wrens with George Curtis, where they drank "beer, wine and some liquor" (J.A. 63) and became "very drunk." (J.A. 200). According to Mr. Moore, at some point the two men started for the home of Fredger Stapleton, George Curtis' uncle, an elderly man known to keep a large sum of money at his home. (J.A. 50-51). As the two reached the Stapleton house, "Curtis got scared" and they returned to Curtis'

home. (J.A. 70-71; 200). Some time later, Mr. Moore returned and entered the Stapleton house alone.

Moore, very drunk, had just gone into Mr. Stapleton's living room when Stapleton awoke and

> came out of his bedroom with a shotgun . . . [Moore] knocked the shotgun to the left, a shot fired from the shotgun and at the same time, [Moore] pulled his gun out and fired.

(J.A. 50). Mr. Stapleton was mortally wounded when two bullets entered his chest. (J.A. 27). Mr. Moore went to Stapleton's bedroom, took money from some pants that were lying in the room, and departed, carrying Stapleton's shotgun. (J.A. 50).

Investigators contacted Curtis the following day; he said that Mr. Moore "must have been the one responsible." (J.A. 60). When arrested soon thereafter, Mr. Moore confessed his role in the crime and expressed regret. (J.A. 49-50).

B. Mr. Moore's Guilty Plea

Mr. Moore retained a local Augusta, Georgia attorney, Hinton Pierce. (J.A. 19-20). Mr. Pierce advised his client to plead guilty, and on June 4, 1974, Mr. Moore did so. (J.A. 5). At Pierce's suggestion, Moore waived his right to a jury trial on the issue of sentence, *see* Former Ga. Code Ann. §26-3102. A sentencing hearing was directed for July 17, 1974, before Hon. Walter McMillan. (J.A. 6-7).

C. The State's Presentence Investigation

Despite Georgia legislation forbidding the use of presentence reports in capital cases after July 1, 1974, *see*, *Munsford* v. *State*, 235 Ga. 38, 218 S.E.2d 792, 797-798 (1975), Judge McMillan inexplicably directed a local probation officer, J. Clark Rachels, to conduct a presentence investigation and prepare a report for the July 17, 1974 sentencing hearing. (J.A. 105). Rachels held a lengthy meeting with Mr. Moore in his jail cell, in the absence of Moore's attorney. (J.A. 106; 194). During

his interview, Rachels failed to inform Moore that he had a right to remain silent, that he had a right to the presence of his attorney, Mr. Pierce, and that anything Moore said could be used against him during the sentencing hearing. (J.A. 194-95). Mr. Moore was not solicited to, and did not, waive any of his constitutional rights during this interview. (J.A. 195).

Officer Rachels subsequently prepared an extensive, five-page, single-spaced "case study," (*see* J.A. 93-104) which was incorporated into an overall presentence report comprising over 60 pages of official documents and reports. The report was introduced into evidence during the sentencing hearing.

D. The State's Presentation Report

Mr. Rachel's five-page case study (*see* J.A. 93-104), contained numerous errors. These errors misstate (1) the events of the crime; (2) Mr. Moore's marital and economic circumstances; (3) the attitudes of the victim's family; (4) the attitudes of Mr. Moore's military superiors; and (5) Mr. Moore's prior criminal record—all errors relevant to Mr. Moore's present constitutional challenges.

(1) In describing the crime, Rachels suggested that Curtis and Moore had attempted to rob Mr. Stapleton on more than one occasion, but that "every time, Curtis got drunk." (J.A. 97-98). The direct evidence indicates, on the contrary, that Mr. Moore and Curtis made *only one attempt* to commit the robbery—on the evening of April 2, 1974, when Mr. Stapleton was shot and killed. (J.A. 50-51; 200).

Rachels also wrote that "Moore states he . . . shot the man four times and during this time, the shotgun went off." (J.A. 98). The record evidence indicates, however, that Stapleton first hit Moore with the barrel of his shotgun and then fired the shotgun in his darkened living room, all *before* Mr. Moore drew his pistol and fired in response. (*See* J.A. 50; 200).

(2) Mr. Rachels also reported to the Superior Court that Moore and his wife "seem to have no marriage problems." (J.A.

102). Yet, as indicated *supra*, Mr. Moore had in fact recently become estranged from his wife, who had turned to prostitution and drugs, abandoning their two-year-old child to Moore's sole care. Rachels' report did note that Mr. Moore had no cash on hand (J.A. 102), but he failed to describe the extent or nature of Moore's desperate financial situation or indicate that Moore had been seeking emergency loan funds from the Red Cross at the time of the crime.

(3) Mr. Rachel's report included reputed accounts of the attitudes of four members of Fredger Stapleton's family, three of whom reportedly urged vehemently that Moore receive a death sentence, insisting that Moore "should be punished to the fullest extent of the law." Mr. Rachels' report did *not* include statements from the many persons in the black community of Wrens—including many Stapleton family members—who believed that George Curtis's instigating role in the crime had never been made public, and that Mr. Moore should not receive a death sentence. (*See* Federal Petition, Appendix K) (sixteen letters and affidavits of Jefferson County citizens supporting more lenient treatment of Mr. Moore). For example, Sara Farmer, Fredger Stapleton's niece, has related her willingness to have testified *on Mr. Moore's behalf* during the sentencing hearing:

> I saw Billy [Moore] . . . in Court at the [July 17th sentencing] hearing. His sisters were there. Billy's sister came over to us and she said will you help us. She was scared Billy could receive the death sentence. I said I didn't want Billy to be electrocuted . . . I told Billys [sic] sister, no, Billy will not be electrocuted, they don't do that anymore and we don't want that. But then the Judge came in an he sentenced Billy . . . If I could have, I would have stood up and said No, please don't take his life.

(Federal Petition, Appendix K, Sara Farmer Letter, at 2). Mrs. Mary Jordan, another Stapleton relative, also stated that she would have spoken against Mr. Moore's death sentence. (J.A. 211-13).

(4) Although Mr. Rachels' report accurately summarized Mr. Moore's military record, (J.A. 102), it indicated that Moore's commanding officer did "not know too much about this soldier" and had stated "that he was not doing anything good or anything bad." Two other sergeants reflected a similar lack of familiarity with Mr. Moore's character and behavior. (J.A. 103). Yet Mr. Moore gave Officer Rachels the names of many officers at Ft. Gordon who had direct and highly favorable comments about him (J.A. 199); no comments from these soldiers were included in Rachels' written report to the Superior Court. (*See* J.A. 199-200; J.A. 168-169; Federal Petition, Appendix K, at 9).[1]

(5) Finally, Mr. Rachels listed 10 juvenile offenses in a portion of his "case study" devoted to Mr. Moore's criminal record. (J.A. 99). In fact, Moore had been brought before the juvenile courts on only four occasions; the other alleged offenses—such as an unexplained "molesting" charge, which involved no more than an unverified complaint by an elderly woman that young Moore voiced an obscenity in the presence of another boy, (J.A. 197)—had never resulted in any formal charges, much less any convictions. (J.A. 196-97).

E. The Sentencing Hearing

Mr. Moore's sentencing hearing before the Superior Court was relatively brief. The State submitted the Rachels presentence report and offered live testimony from a medical examiner (J.A. 25-29) and from three investigating officers (J.A. 29-63). The parties have strongly disagreed on whether Moore and his counsel were allowed to review the report prior to the hearing. It is undisputed, however, that the state habeas court

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[1] During his Army Dismissal Hearing after receipt of his death sentence, Moore was described by his platoon sergeant as "always a sharp-looking soldier" whose "attitude about the Army was excellent," a soldier who "did an excellent job . . . as a squad leader" and who had a special ability to iron out conflicts. (Federal Petition, Appendix K, at 9).

made no findings on (i) the extent of the opportunity, if any, afforded Mr. Moore and his counsel on July 17th to examine the five-page "case study" portion of the 72-page Rachels report, or (ii) whether Mr. Pierce or Billy Moore actually *did* examine that case study.

Defense attorney Hinton Pierce presented no structured defense in response to the State's sentencing case. Instead, Pierce simply informed the court that several members Moore's family were present and invited the judge himself "just [to] swear them and let them take the stand and let them tell you whatever they want to say, any way the Court wishes." (J.A. 64). The entire testimony from these witnesses comprises less than five pages of the hearing transcript. (J.A. 64-70). When the court asked the last witness whether she had "anything else [she] . . . would like to say," she responded, "I probably will think of a million things when I sit down." (J.A. 69). Throughout, Mr. Pierce asked not a single question of a single witness.

Billy Moore then took the stand. Mr. Pierce once again declined to ask any questions, instead inviting his client simply "to try as best you can to tell the Judge how you got mixed up and how you came about doing this thing and how you feel about it." (J.A. 70). Moore's direct testimony comprises less than a full transcript page. (J.A. 70-71). Mr. Pierce introduced no evidence to correct or contradict the erroneous statements in the presentence report. He did not seek to call Mr. Rachels, or to question any of the persons cited in the case study about their statements.

Georgia law in 1974 permitted a capitally-sentenced defendant to withdraw a guilty plea after sentence was pronounced, but before it was physically entered by the clerk. *See, e.g.*, *Williams* v. *State*, 148 Ga. App. 521, 251 S.E.2d 601 (1978). Yet Mr. Pierce advised Mr. Moore not to withdraw his plea, even if the trial judge imposed a sentence of death (Federal Petition, Appendix B, at 16), and he made no effort to withdraw the plea when the judge sentenced Mr. Moore to death.

F. The Trial Judge's Sentencing Report

In pronouncing sentence, the trial judge expressed the opinion that Mr. Moore had done "everything that a man could do after [he was] . . . caught and [did] an honorable thing insofar as your true statements made, your cooperation with the officials, pleading guilty to the mercy of the court." (J.A. 77). He nevertheless imposed a death sentence, setting forth his reasons in a sentencing statement. (J.A. 77-79).

Subsequently, pursuant to Georgia law, *see* Former Ga. Code Ann § 27-2537, the trial judge completed a six-page Trial Judge's Report to the Supreme Court of Georgia. The report establishes affirmatively that the trial judge relied on several inaccurate portions of the Rachels case study. For example, the judge indicated in response to a question on the report concerning nonstatutory aggravating factors that

> on another occasion the defendant had entered the house of the deceased and [the crime] was not completed. The defendant returned again on the date that the robbery and murder occurred. In other words, this crime had been planned for sometime prior to its execution.

(J.A. 86). In response to a question concerning the defendant's "record of prior convictions," the trial judge recited two of the 10 prior convictions shown by the Rachels report and then explicitly stated, "Juvenile violations—see Probation Officer's report." (J.A. 89).

II. The Initial Habeas Corpus Proceedings

A. State Habeas Corpus Proceedings

After his direct appeal had been denied, Mr. Moore's case fell to James Bonner, an attorney with Georgia's state-funded Prisoner Legal Counseling Project. At that time, Mr. Bonner had responsibility for "a docket of approximately one hundred and fifty (150) cases, of which Mr. Moore's case was one." (J.A. 189). Mr. Bonner filed a short, four-page state habeas corpus petition in the Superior Court of Tattnall County, asserting five constitutional claims. He did not assert the ineffective assistance of

Moore's trial attorney, apart from counsel's failure to withdraw Moore's guilty plea after the imposition of a death sentence. (Federal Petition, Appendix A). In its subsequent opinion, the state habeas court ultimately made factual findings upholding trial counsel's performance at both the guilt phase and the sentencing phase.

Mr. Bonner did claim that the State's use of the Rachels "case study" violated Mr. Moore's Eighth and Fourteenth Amendment rights as interpreted in *Gardner* v. *Florida*, 430 U.S. 349 (1977). (Federal Petition, Appendix B, 15-18; 22-27). Addressing the *Gardner* claim, the state court noted the following excerpt from the July 17th sentencing transcript:

> BY MR. THOMPSON [District Attorney]: Now, if Your Honor please, we have referred on several occasions to a report that was made by the Probation Officer, Mr. Clark Rachels, which included a Crime Lab report, I would like to submit the entire records [sic] as State's Exhibit No. 27 that you now hold in your hand. Counsel for the Defendant has received the copy of the report so that it will include in the record. . . .
>
> BY MR. PIERCE: This is agreeable, Your Honor, and at the same time, we would like for a copy of the warrants to go in also.

(Federal Petition, Appendix B, 20-21). It also noted the affidavit of Officer Rachels summarized below.[2] After reciting

[2] Mr. Rachels submitted an affidavit to the state habeas court averring that, on the date of the sentencing hearing, he furnished a copy of the report to Hinton Pierce, who allegedly "requested a short recess prior to sentencing, that he may have time to review the contents" of the report. (J.A. 106). Rachels' affidavit also suggests that Mr. Moore was shown at least the "Personal Statement" portion of the report by Mr. Pierce, who asked Mr. Moore "if the contents of the personal statement contained in the report is what [Moore] . . . related to officers." (*Id.*)

Both Hinton Pierce and Mr. Moore sharply disputed this account. Mr. Pierce (who is currently the Untied State Attorney for the Southern District of Georgia), gave live testimony before the state habeas court, denying that he ever saw the report prior to sentencing:

> I'll say this, I have never seen a presentence investigation report prior to sentencing in any State Court that I can recall. An I'm sure if I had seen it in this case, I would have remembered it, because it would have been most unusual . . .]. The only time I saw it was [sic] in the transcript when I went up to the Supreme Court.

(J.A. 108-109). Mr. Moore has averred that he first saw the presentence report some two years after he had been sentenced, while incarcerated on Death Row at the Georgia State Prison. (J.A. 195).

these two items, the state habeas court summarily concluded that Mr. Moore's *Gardner* claim was "without merit." (*Id.*). The Supreme Court of Georgia thereafter declined to review the judgement of the state habeas court.

B. The Initial Federal Proceedings

After exhausting state proceedings, Mr. Bonner filed a federal petition for a writ of habeas corpus on November 22, 1978, asserting four federal constitutional claims. (J.A. 111). Mr. Bonner did not carry forward the *Gardner* claim, nor did he include any claim that Mr. Moore's trial counsel had been ineffective.

In early February, Mr. Bonner informed Moore by telephone that he intended to withdraw as counsel. Mr. Moore sought to file an amended, *pro se* federal petition, alleging various failures by his trial attorney. (J.A. 142-53). Shortly thereafter, on March 19, 1979, Mr. Bonner formally moved the federal court to be relieved as lead counsel for Mr. Moore.[3] During a

[3] The motion noted Mr. Bonner's seven-attorney office had been placed under a federal court mandate during 1978 to provide legal services to 14,000 Georgia inmates in 56 different Georgia facilities (Motion, at 1), and that Bonner's seven-lawyer staff already had eleven capital cases to service. Mr. Bonner informed the federal court that "in order to assure that the Petitioner's right to a full collateral review of his death sentence is not prejudiced by the responsibilities to others under death sentence which have fallen upon his present counsel," Mr. Bonner should be relieved as counsel. (Motion, at 3).

June 18, 1979 hearing before a federal magistrate, Mr. Bonner adverted to his motion to be relieved and stressed to the magistrate that he was in conflict with Mr. Moore on the ineffectiveness claim. (Transcript of June 18, 1979 Hearing, 26-27).

Subsequently, the federal magistrate took no action, either on Mr. Moore's *pro se* motion to amend or on Mr. Bonner's motion to be relieved. Instead, following the untimely death of Hon. Alexander Lawrence, *see* 48 U.S.L.W. 2220 (Sept. 25, 1979), the case languished for over a year until a new federal judge had been assigned.

Before that assignment had been announced, however, on September 30, 1980, a new volunteer attorney, Diana Hicks, entered her appearance on behalf of Mr. Moore. The next day, October 1, 1980, Ms. Hicks filed a proposed amended habeas corpus petition. (J.A. 121-138). The petition sought to present the *Gardner* claim that had been adjudicated by the state habeas court. (J.A. 128-129). In an accompanying brief, Ms. Hicks argued that the merits of the *Gardner* claim had not been fully or adequately adjudicated in the state court, since that court had relied principally upon the untested Rachels affidavit and since the state court had failed to make full factual findings. (Memorandum, dated October 23, 1980, 9-12).

When she learned about the assignment of the case to a new district judge, Ms. Hicks wrote stating her intention to challenge the effectiveness of Mr. Moore's trial counsel—including his performance at the sentencing phase—as soon as she had fully exhausted state remedies on the claim. (Letter of November 5, 1980).

Before these steps had been completed, however, on April 29, 1981, the District Court entered an order granting relief on one of the claims asserted by Mr. Moore in his original federal petition. *Blake* v. *Zant*, 513 F.Supp. 722 (S.D. Ga. 1981).[4]

[4] The District Court concluded that the trial judge had imposed Mr. Moore's death sentence in reliance on an idiosyncratic, nonstatutory aggravating circumstance, and that the Georgia Supreme Court had erred by failing adequately to review his sentence. 580 F.Supp. at 811-817.

Simultaneously, the District Court denied both (i) Mr. Moore's *pro se* motion to amend and (ii) Mr. Hicks' motion to amend, adding the *Gardner* v. *Florida* claim. The Court stated that it found "no sound reason for permitting further amendment at this late stage of the present case," suggesting that to do so "would only promote delay and confusion." *Id.* at 805-806.

On appeal, a panel of the Court of Appeals affirmed the District Court's grant of sentencing relief to Mr. Moore, albeit on a different ground—that the trial court had improperly relied on a nonstatutory aggravating circumstance. *Moore* v. *Balkcom*, 709 F.2d 1353, 1365-1367 (11th Cir. 1983).[5] Following this Court's decision in *Zant* v. *Stephens*, 462 U.S. 862 (1983), however, the panel withdrew its initial opinion and substituted another, denying relief. 716 F.2d 1511 (11th Cir.), *reh'g denied*, 722 F.2d 629 (1983). This Court denied certiorari on March 3, 1984. *Moore* v. *Balkcom*, 465 U.S. 1084 (1984).

III. The Second Federal Petition

A. Proceedings In The District Court

On May 11, 1984, Mr. Moore filed a second state habeas corpus petition, asserting not only the ineffective assistance and the *Gardner* claims which he had sought to have adjudicated in his first petition, but also several claims based upon constitutional developments that had occurred since his first state petition had been filed in 1978. Among these new claims were allegations: (i) that Probation Officer Rachels' interrogation of Mr. Moore violated the principles established by this Court's 1981 opinion in *Estelle* v. *Smith*, 451 U.S. 200 (1981); and (ii) that the failure of Georgia law to provide for confrontation and cross-examination of presentence report witnesses was contrary the Eleventh Circuit's 1982 opinion in *Proffitt* v.

[5] The panel also denied Mr. Moore's cross-appeal from the District Court's denial of his motions to amend the federal petition. The panel concluded simply that the District Court's decision denying Mr. Moore's proposed amendments had not been an abuse of discretion. 709 F.2d at 1369.

Wainwright, 685 F.2d 1227 (11th Cir. 1982), *modified*, 706 F.2d 311 (1983). The Georgia courts denied relief, finding that these claims either had been or could have been raised in Mr. Moore's first state petition. (Federal Petition, Appendix G).

On May 18, 1984, Mr. Moore asserted these claims in a second federal habeas petition. (J.A. 154-188). Three days later, the District Court held a hearing on abuse of the writ. On May 22, 1984, the District Court entered a 37-page order dismissing the petition without reaching the merits of any of Mr. Moore's claims. (Pet. for Cert., A2-34). That order is described in subdivision B below.

A divided panel of the Court of Appeals initially affirmed the dismissal, adopting the opinion of the District Court *in toto*. (*Id.*, 1-34). The full Court of Appeals, however, after rehearing the case *en banc*, affirmed in part, reversed in part, and remanded to the District Court for further proceedings. (Pet. for Cert., A46-120). *Moore* v. *Kemp*, 824 F.2d 847 (11th Cir. 1987) (en banc). That opinion is described in subdivision C.

This Court granted the State's petition for certiorari on April 18, 1988. 56 U.S.L.W. 3718 (U.S., April 19, 1988) (No. 87-1104).

B. The Opinion Of The District Court

Virtually all of the claims presented in Mr. Moore's second federal petition raise questions about the factual accuracy and integrity of Moore's capital sentencing proceedings. The District Court below acknowledged that Mr. Moore's claims—especailly those related to the accuracy of Clark Rachels' "case study"—caused

> this Court to hesitate, for if attorney Pierce did fail to scrutinize the report, then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information.

(Pet. for Cert., A26). Distinguishing *Strickland* v. *Washington*, 466 U.S. 668 (1984), on this score, the District Court

found that "corrected information would have materially altered the [sentencing] profile before the [trial] judge." (Pet. for Cert., A67).

Despite these material errors in Mr. Moore's sentencing trial, the District Court did not grant habeas relief, because it concluded that Moore's constitutional claims constituted an abuse of the writ. In reaching that judgment, the District Court first reviewed the law governing the disposition of successive federal petitions. (Pet. for Cert., A7-A12). It noted the broad discretion vested by Congress in the district courts to dispose of successive habeas claims, citing *Sanders* v. *United States*, 373 U.S. 1, 18 (1963). It then indicated that its own view of the appropriate *scope* of its discretion had been clouded by then-recent pronouncements by other habeas courts; in particular, it pointed to this Court's opinions in *Woodard* v. *Hutchins*, 464 U.S. 377 (1984), and *Antone* v. *Dugger*, 465 U.S. 200 (1984), as well as the Fifth Circuit's opinion in *Jones* v. *Estelle*, 722 F.2d 159 (5th Cir. 1983) (en banc). (*Id.* A12-A13).

After further examination of these cases, the District Court declared that it would henceforth adopt a new standard under which "exhaustion' (*Rose*) and 'procedural default' (*Engle*) case law analysis [would be] intermixed in [its] . .]. 'new law' abuse-of-writ analysis." The Court announced that "the analysis of the 'new law' claims found in the procedural default cases (*Engle*) constitutes an appropriate basis for evaluation of the *Estelle* v. *Smith* 'new law' claim." (Pet. for Cert. A21).

Applying this new "procedural default" analysis, the District Court concluded that Moore's *Estelle* v. *Smith* and his *Proffitt* v. *Wainwright* claims must be denied, since Mr. Moore, like "the state prisoners [in *Engle* v. *Isaac*, should be] held to have possessed the constitutional tools' to anticipate and argue the 'new law' claim[s] . . . ." (*Id*, A21; A28-A29).

The District Court then turned to Mr. Moore's *Gardner* v. *Florida* claim. Although noting that Mr. Moore's volunteer habeas attorney, Diana Hicks, had sought to include the claim in her amended federal petition some seven months before

Moore's first federal petition was decided, the court nonetheless concluded that "repeated opportunities to litigate this issue have been provided in this case," and declined to reach the merits of the claim. (Pet. for Cert., A27). The District Court also rejected, on procedural grounds, Mr. Moore's ineffective assistance claim, finding itself "troubled by the virtually automatic claim, in habeas petitions, to ineffective assistance of counsel." (*Id.* A33).

C. The Opinion Of The Court Of Appeals

In his opinion for the Court of Appeals, Chief Judge Godbold did not quarrel with the board discretion vested in the lower court by Rule 9(b). Instead, he reasoned that the District Court, by announcing a new "procedural default" standard, had employed an inappropriate legal premise to guide the exercise of its discretion. The majority wrote that

> Rule 9(b) allows dismissal of a claim when the failure of the petitioner to assert those grounds in the prior petition constituted an abuse of the writ.' *Accord* 28 U.S.C. § 2244. The focus on petitioner's conduct is mandated by the basic purpose of the abuse of the writ doctrine—to enforce the equitable principle[] . . . that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seek.' *Sanders* v. *U.S.*, 373 U.S. 1, 17 (1963). An evaluation of a petitioner's conduct in omitting a claim from his first petition necessarily hinges on the petitioner's awareness of the factual and legal bases of the claim when the first petition was filed.

(Pet. for Cert., A52). The majority went beyond Rule 9(b), however, by holding that Mr. Moore was

> chargeable with counsel's actual awareness of the factual and legal bases of the claim at the time of the first petition *and with* the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition."

(*Id.* A52-A53) (emphasis added).

After thoroughly assessing the state of the criminal and constitutional law at the time of Mr. Moore's initial federal habeas filing, the majority concluded that it could not charge Moore in 1978 with the knowledge of the legal bases either of the *Estelle* v. *Smith* claim, (*id.* A53-A59),[6] or of *Proffitt* v. *Wainwright*. (*Id.* A60-A61).

Turning to Moore's allegations under *Gardner* v. *Florida*, the majority first noted the "unusual procedural history" of this claim, which *was* raised in Mr. Moore's first *state* petition, and which Ms. Hicks sought to amend into the first federal petition. (Pet. for Cert., A61). Although it declined to hold "that the district court . . . [had] erred in finding . . . an abuse of the writ" (*id.* A64), the majority emphasized that "[e]ven where abuse is found . . . a federal court should not dismiss, under Rule 9 . . . . if the 'ends of justice' require consideration of the claim on the merits." (*Id.*).

The Court of Appeals professed uncertainty over "what standards should guide a district court in determining whether the 'ends of justice' require . . . consideration on the merits" of an abusive claim. However, drawing upon (i) dicta by the plurality in *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986); and (ii) the "miscarriage of justice" analysis elaborated by this Court in another context in *Smith* v. *Murray*, 477 U.S. 527 (1986) and *Murray* v. *Carrier*, 477 U.S. 478 (1986)—the majority con-

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[6] The majority noted that: (i) there was a "lack of clear guidance in 1978 with respect to constitutional protections that might attach to the sentencing phase" of capital trials (Pet. for Cert., A53-A54); (ii) two of the three cases this Court cited in *Estelle* v. *Smith* were not decided until after 1978 (*id.* A54-A55); (ii) the Fifth Circuit subsequently held that trial counsel in *Gray* v. *Lucas*, 677 F.2d 1086 (5th Cir. 1982) was not ineffective for failing to anticipate the *Smith* holding in 1976; and (iv) because of the special problems created by uncounseled psychiatric interviews under Texas' unique "future dangerousness" sentencing statute, it was far from obvious that *Estelle* v. *Smith* had any application to the very different sentencing scheme enacted by the Georgia legislature. (*Id.* A57-A59).

cluded that, at a minimum, colorable claims of possible factual errors respecting a defendant's "factual innocence" might invoke the "ends of justice" exception. On that basis, the majority held that the District Court here should have an opportunity to reconsider the "ends of justice" issue in Mr. Moore's case:

> The [district] court found that the ends of justice did not require consideration of the *Gardner* claim on the merits. Yet its own statements arguably require the opposite finding. The court stated that if there had been a *Gardner* violation, then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information . . . [I]t is arguable that . . . corrected information would have materially altered the profile before the judge . . . .' Under these circumstances we vacate the denial of the *Gardner* claim and remand in order that the district court can give fresh consideration to whether the ends of justice require it to consider the merits of this claim.

(Pet. for Cert. A66-A67).

SUMMARY OF ARGUMENT

Zant's submission to this Court rests upon a major, unexamined assumption: that the federal courts are free to revise present habeas corpus standards, as they see fit, in order to regulate the disposition of second habeas petitions brought by applicants asserting "new law" claims. This critical assumption is demonstrably false. As Justice White noted in *Autry* v. *Estelle*, 464 U.S. 1301 (1983), Congress has "implicitly recognized[d] the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated," 464 U.S. at 1303, and the federal courts must adhere to Congressional intent.

A review of legislative history discloses that, during the past 40 years, Congress has repeatedly expressed its preference for a standard under which habeas petitions raising "new law" claims may be foreclosed *only* if an applicant has "deliberately withheld" the new claim or has been guilty of "inexcusable

neglect." Zant's present proposal to alter this standard is virtually identical to legislative proposals that have been presented to—and firmly rejected by—Congress on numerous occasions.

The Court of Appeals itself disregarded this Congressional decision by adopting a "reasonable attorney" standard, under which a district court may dismiss a second application *not only* if an applicant deliberately withholds a "new law" claim, *but also* if a reasonable attorney *should have* recognized and asserted the claim earlier. Even under this stricter "objective" standard, the Court of Appeals found that Mr. Moore was entitled to be heard on the merits of his *Estelle* v. *Smith* and *Proffitt* v. *Wainwright* claims. Although we submit that the Court of Appeals was wrong to alter the Congressionally-sanctioned standard, it was plainly correct in concluding that Moore could not have reasonably been expected to foresee either *Estelle* or *Proffitt*, and that he did not abuse the writ by invoking them in a second application. The "without legal foundation" standard—contrived by petitioner in a desperate effort to identify *some* test Mr. Moore might fail to meet—is utterly faithless, not only to Congressional will, but to the basic equitable principles that undergird the Great Writ.

Zant also faults the Court of Appeals for remanding Mr. Moore's *Gardner* claim to the District Court with directions to consider whether the "ends of justice" require resolution of that claim on the merits. Once again, Zant finds himself embarrassed both by the facts and the law surrounding this claim. As a procedural matter, Mr. Moore should not have been held to have abused the writ, since "[e]xcept for his failure to include the *Gardner* . . . claim[] in the document which initiated his first habeas proceeding," as Judge Kravitch noted below,

> Moore did all he could to have the claim litigated by the first habeas court. Accordingly, this is not an instance of "needless piecemeal litigation' nor is the purpose of the present petition 'to vex, harass, or delay.' Rather, having sought in vain to have his claims litigated in a single proceeding, Moore now seeks a decision on the merits

> regarding [a] . . . claim[] which the district court earlier refused to address.

(Pet. for Cert., A40).

Moreover, the substance of the *Gardner* claim strikes directly at the essential integrity of Moore's sentencing verdict. As both the District Court and the Court of Appeals agreed, the Probation Officer's presentation report appears marred by numerous material factual errors which raise a "sufficient likelihood . . . for finding that a wrongful sentence was imposed based on inadequate information." (Pet. for Cert., A36).

Even if the appropriate test of the "ends of justice" were limited to habeas cases in which "the alleged constitutional error . . . precluded the development of true facts []or resulted in the admission of false ones," *Smith* v. *Murray*, 477 U.S. 527, 538 (1986)—a question the Court does not have to resolve in this case—Mr. Moore would stand fully entitled to relief. He should not be dispatched to his death because of a presentence report, laced with serious errors, omissions, and misstatements that was (i) submitted by the State to the sentencing court in violation of Georgia law, (ii) not subjected to confrontation or cross-examination, (iii) made available to Moore and his trial counsel, if at all, not at the last minute, under circumstances affording no meaningful opportunity for review, and (iv) yet, plainly relied upon by the judge who imposed Moore's death sentence.

ARGUMENT

I THE COURT SHOULD DECLINE THE INVITATION BY THE GEORGIA ATTORNEY GENERAL TO CREATE NEW HABEAS STANDARDS THAT WOULD SUPERSEDE THE STATUTES AND RULES ENACTED BY CONGRESS

A. The Congressional Standard

Zant's submission to this Court is, at bottom, a plea for a major revision in habeas corpus law, to be accomplished via judicial decree. In Subdivision C below, we will show that, even

were the federal courts free to legislate new habeas rules, petitioner's proposed change would be unnecessary and unwise.

The first issue, however, is not the wisdom of Zant's proposal, but its unstated legal premise: that the decision to strike a new balance on successive habeas petitions is properly committed to the judiciary, not to Congress. The federal courts, of course, are not generally free simply to promulgate new substantive or procedural rules, heedless of the prior actions of the Congress. *See, e.g., United States*, v. *Locke*, 471 U.S. 84, 95 (1985); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). Only after they have assured themselves of their authority to change the law can they properly proceed to consider arguments for the desirability of doing so.

In the present case, the issue of judicial authority is controlling. Federal habeas corpus is a statutory remedy, and the history of Congressional enactments governing successive petitions—specifically, 28 U.S.C. § 2244, 28 U.S.C. § 2244(b), and Rule 9(b)—demonstrates that Congress has, definitely and repeatedly, rejected the new habeas standards Zant now urges the Court to adopt.

In *Autry* v. *Estelle*, 464 U.S. 1301 (1983), Justice White has written of the *desirability* of a new rule that would "require by statute that all federal grounds for challenging a conviction or a sentence be presented in the first petition for habeas corpus." 464 U.S. at 1303. Yet he refused judicially to *create* such a rule, because "historically, res judicata has been inapplicable to habeas corpus proceedings, *Sanders* v. *United States*, 373 U.S. 1, 7-8 (1963)," and because "28 U.S.C. § 2244 (a) and 28 U.S.C. § 2254 Rule 9 implicitly recognize the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated." 464 U.S. at 1303. The legislative history fully vindicates Justice White's position, and it is to that history that we first turn.

1. Congressional Intent: 28 U.S.C. § 2244

Congress initially provided for federal habeas corpus jurisdiction over state prisoners in 1867. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. The 1867 Act did not contain any provision directed explicitly to the question of successive petitions; it did contain a provision broadly empowering the federal courts to "dispose of the party as law and justice so require."

Just how broad a jurisdiction Congress originally contemplated under the 1867 Act has been subject to much debate, both in the scholarly community and in the courts. Indisputably, however, by the mid-1940's, the practical scope of the federal writ had expanded significantly.[7] The Court gave the Act a broad reading in five important cases decided during this period which addressed the successive petition issue: *Loisel* v. *Salinger*, 265 U.S. 224 (1924); *Wong Doo* v. *United States*, 265 U.S. 239 (1924); *Waley* v. *Johnston*, 316 U.S. 101 (1942); *United States ex rel. McCann* v. *Adams*, 320 U.S. 220 (1943); and *Price* v. *Johnston*, 334 U.S. 266 (1948).[8]

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[7] In 1938, the Court emphasized, in its seminal opinion in *Johnson* v. *Zerbst*, 304 U.S. 458, 466 (1938), that "Congress has expanded the rights of a petitioner for *habeas corpus* and the . . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice . . . a more searching investigation, in which . . . the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'".

[8] In *Loisel*, the Court ratified earlier federal cases that had constructed the 1867 Act "as meaning that each application is to be disposed of in the exercise of a sound judicial discretion, guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought." 265 U.S. at 231. Citing Justice Field's opinion in *Ex parte Cuddy*, Fed. 62 (1889), the Court held that principles of *res judicata* were inapplicable to successive applications, although "[t]he officers before whom the second application is made may take into consideration the fact that a previous application has been made . . . and refused.'" *Id.* In *United States ex rel. McCann*, the Court held that a lower court should not have dismissed a second habeas petition—brought by the relator after this Court itself had denied his first application—since the issue presented by the second application "was explicitly withdrawn from consideration on the habeas corpus proceedings previously before the Circuit Court of Appeals [and] . . . has never been adjudicated on its merits by the lower courts." 320 U.S. at 221.

Adams and *Price* are particularly significant, since they constituted authoritative declarations of the state of habeas law, and they were rendered only shortly before Congress enacted 28 U.S.C. § 2244—the first statutory provision governing successive petitions—as part of its 1948 codification of the federal judicial code. The House Judiciary Committee, in recommending the 1948 legislation, emphasized its intention that its proposed Section 2244 would "make[] no material change in existing practice." H.R. Rep. 308, 80th Cong., 1st Sess. A178 (1947).[9]

In *Wong Doo*, the Court identified the failure to come forward with available proof as "an abusive use of the writ," absent some "reason for not presenting the proof at the outset." 265 U.S. at 241. *Price* v. *Johnston* demonstrated the Court's resolve, however, that if an applicant *could* offer a sound reason, even—as did Price—in an amendment to his fourth habeas application, *see* 334 U.S. at 288, the federal courts should not summarily dismiss it:

> If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

334 U.S. at 291. The decision in *Waley* likewise reflects the Court's insistence that, when an applicant has an excuse for the failure to present the claim on an earlier application, a second petition ought not be denied. 316 U.S. at 105.

[9] The House Judiciary Committee was far from oblivious to the problem of abusive petition; on the contrary, it explicitly noted that "[t]he practice of suing out successive, repetitious, and unfounded

The Senate Judiciary Committee, acting pursuant to a proposal by the Judicial Conference, recommended a modification of the original language of proposed Section 2244 in order to emphasize that federal courts would retain the equitable power of the federal court to entertain successive petitions. "The original language of the section," the Senate Committee feared, might be read to

> den[y] to Federal judges the power to entertain an application for a writ of habeas corpus where the legality of the detention has been determined on a prior application. The amendment [would] . . . modify this provision so that, while a judge need not entertain such a later application for the writ under such circumstances, he is not prohibited from doing so if in his discretion he thinks the ends of justice require its consideration.

S. Rep. No.1559, 80th Cong. 2d Sess 9 (1948).

Section 2244 as revised passed the full Senate and became law on June 25, 1948—less than one month after the Court's decision in *Price* v. *Johnston* had been announced.[10]

2. Congressional Intent: § 2244(b)

In the 18 years between 1948 and 1966, numerous attempts were made to change federal law to restrict federal habeas

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writs of habeas corpus imposes an unnecessary burden on the courts." H.R. Rep. 308, 80th Cong. 1st Sess. A178 (1947). Yet the Report noted that the current procedures were adequate to protect against abuses: "the courts have consistently refused to entertain successive "nuisance" applications for habeas corpus." (*Id.*)

[10] As enacted, § 2244 read:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

jurisdiction for state prisoners. Congress rejected all of them. Legislation specifically directed to 28 U.S.C. § 2244, for example, was proposed "in the 84th, 85th, 86th, and 88th, as well as [the 89th] Congress, . . . sponsored by the Judicial Conference of the United States." H.R. Rep. No. 1892, 89th Cong., 2d Sess. 3 (1966).

The most significant case law development during the period was *Sanders* v. *United States*, 373 U.S. 1, (1963), in which the Court set out in detail the principles that should govern district courts in the exercise of their discretion on second habeas applications. Unlike § 2244, which by its express terms governed only those successive applications raising constitutional claims *previously* adjudicated, the Court in *Sanders* also spoke to second applications that asserted *new* claims. The Court identified *Price* v. *Johnston* as such a case, distinguishing it from the earlier decision in *Wong Doo* as follows:

> Wong Doo was distinguished on the ground that there the proof had been 'accessible at all times' to the petitioner, which demonstrated his bad faith, 334 U.S. at 289; in Price, by contrast, for aught the record disclosed *petitioner might have been justifiably ignorant of newly alleged facts or unaware of their legal significance.*

373 U.S. at 10. (Emphasis added). Adhering to *Price*, the *Sanders* Court held that, "[n]o matter how many prior applications for federal collateral relief a prisoner has made," if another petition presents a claim that has not previously been adjudicated, "full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ." 373 U.S. at 17. The Court reaffirmed that "abuse" was to be measured according to "traditional[] . . . equitable principles," *id.*, and cited the "deliberately withhold[ing] of one of two grounds for federal collateral relief . . . in the hope of being granted two hearings rather than one," 373 U.S. at 18, as exemplary of conduct that would disentitle an applicant to relief.

Finally, the Court held that "[t]he principles developed in" *Fay* v. *Noia*, 372 U.S. 391, 438-440 (1963) and *Townsend* v.

Sain, 372 U.S. 291, 317 (1963)—which demand proof of "deliberate[] by-pass[]" or "inexcusable neglect"—"govern equally here." 373 U.S. at 18. The Court made it

> very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard.

Fay v. *Noia*, 372 U.S. at 439.

The principles set forth in *Sanders* were employed regularly by lower federal courts 1963 until 1966, when Congress once again took legislative action. As in 1948, Congress acted in 1966 in response to a bill drafted by the Judicial Conference. H.R. Rep. No. 1892, 89th, Cong. 2d Sess. 3 (1966). The legislation added two subsections to § 2244, denominated (b) and (c). Subsection (b) provided that a second application, presented by a habeas petitioner whose previous application had been adjudicated on its merits, need not be entertained by a district court *unless* (i) the application was predicated on "a factual or other ground not adjudicated on the hearing of the earlier application," and unless (ii) the district court was "satisfied that the applicant had not on the earlier application *deliberately withheld the newly asserted ground or otherwise abused the writ.*" (Emphasis added).

The House Judiciary Committee explained that the purpose of this provision was to provide "for a qualified application of res judicata." H.R. Rep. No. 1892, at 8. The Senate Report, however, indicated just how "limited" an application of res judicata principles was intended when it identified, as the target of the revision, those "applications either containing allegations identical to those asserted in a previous application that has been denied, *or predicated upon grounds obviously well known to them when they filed the preceding application.*" S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966). The Senate Report attached a letter from the Committee on Habeas Corpus of the

Judicial Conference that had drafted the subsection, concurring that the intended targets of the provision were state prisoners who had used successive applications to present "additional grounds well known to them when they filed the preceding application." (*Id.*, 5).

Following Congressional enactment in 1966, this Court and the lower federal courts applied 28 U.S.C. § 2244(b), as suggested by the Senate report, to preclude only those successive applications that were deliberate or in bad faith. For example, in *Smith* v. *Yeager*, 393 U.S. 122 (1968) (per curiam), the Court held that inmate Smith's failure to request an evidentiary hearing during his initial federal proceeding did *not* constitute an abuse that would bar a hearing on the same claim in his second application. Noting that the standards for obtaining such hearings had been relaxed in the interval between the applicant's first and second applications, the Court hewed to the Congressionally mandated line:

> Whatever the standard for waver may be in other circumstances, the essential question here is whether the petitioner 'deliberately withheld the newly asserted ground' in the prior proceeding, or otherwise abuse the writ.' 28 U.S.C. § 2244(b) . . . [P]etitioner should [not] be placed in a worse position because his then counsel asserted that he had a right to an evidentiary hearing and then relinquished it. Whatever counsel's reasons for this obscure gesture of *noblesse oblige*, we cannot now examine the state of his mind, or presume that he intentionally relinquished a known right or privilege, *Johnson* v. *Zerbst*, 304 U.S. 458, 464, when the right or privilege was of doubtful existence at the time of the supposed waiver. In short, we conclude that petitioner's failure to demand an evidentiary hearing in 1961 . . . constitutes no abuse of the writ of habeas corpus.

393 U.S. at 125-126.[11]

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[11] The Justice Department in the post-1966 period, while disapproving the Congressional judgment embodied in § 2244, nevertheless plainly assumed that power to modify the standard lay with Congress. (*See, e.g., Speedy Trial: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92nd Cong., 1st Sess. 97-98 (1971).

3. Congressional Intent: Rule 9(b)

In 1976, Congress once again turned its attention to the appropriate standard to govern successive federal petitions, this time prompted by the Court's submission to Congress—pursuant to the "Rules Enabling Act, 28 U.S.C. § 2072 (1970)—of proposed Rules Governing Section 2254 Cases in the United States District Courts. *See* 425 U.S. 1165 (1976). Exercising its reserved authority under § 2072, Congress did *not* allow the proposed Rules automatically to become law. Instead, in response to sharp criticism from some quarters, Congress "voted to delay the effective date of the proposed rules . . . in order to afford itself the opportunity to review and amend the rules if necessary." Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Act*, 63 Iowa L. Rev. 15, 22 (1977). *See* Act of July 8, 1976, Pub. L. No. 94-349, 90 Stat. 822.

During House hearings in August of 1976, proposed Rule 9(b)—which was designed to address successive habeas petitions—became one of the chief foci of attention. Criticism centered on a phrase that would have permitted a district court to dismiss a second petition asserting "new or different grounds [if] the judge f[oun]d that the failure of the petitioner to assert those grounds in a prior petition is *not excusable*." (Emphasis added). Despite assurances by principal draftsmen of Rule 9(b), that this language was intended to leave the law "fully consistent with the applicable statutory provisions as to both 2254 and 2255 cases and with the Supreme Court decision in *Sanders* v. *United States*,"[12], other witnesses worried aloud that this language might constitute "a covert effort to change

[12] *Habeas Corpus: Hearings Before the Subcomm. on Criminal Justice of the Comm. of the Judiciary*, 94th Cong., 2d Sess. 101 (August 5 & 30, 1976) (statements of Judge Webster and Professor LaFave). *See also* Statement of Daniel Kremer for the National Association of Attorneys General ("The Committee [on Habeas Corpus] understands this subdivision to restate existing law (*see Sanders v. United States).*" Hearings, *supra*, at 47.

existing law by use of the rulemaking process," *id.* at 23, substituting an undefined standard for "the deliberate bypass" test enunciated in *Fay* v. *Noia*," and adopted in *Sanders*. (*Id.*, 24).[13]

In its ultimate report on the proposed Rules, the Committee on the Judiciary recommended changes in only four substantive provisions; Rule 9(b) was one of them. As it explained:

> The committee believes that the 'not excusable' language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition. The abuse of writ' standard brings rule 9(b) into conformity with existing law. As the Supreme Court has noted in reference to successive applications for habeas corpus relief and successive § 2255 motions based upon a new ground or a ground not previously decided on the merits, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading.' *Sanders* v. *United States*, 373 U.S. 1, 17 (1963). See also 28 United States Code, section 2244(b).

H. R. Rep. No. 94-1471, 94th Cong., 2d Sess. (1976). On September 28, 1976, Rule 9(b) was enacted into law. Act of Sept. 28, 1976, Pub. L. 94-426, 90 Stat. 1335.

In sum, Congress in 1976 firmly rejected language, proposed by this Court for inclusion in Rule 9(b), because of Congressional apprehension that such language might be interpreted (i) to justify a departure from the standards set forth in *Sanders*, and thus (ii) to afford the district courts "too broad a discretion to dismiss a second or successive petition." As the

[13] Professor Burt Neuborne expressed the concern that proposed "Rule 9(b) . . . authorizes dismissal of a habeas corpus petition (even if meritorious) if new and different grounds for relief in a second petition were not presented to the court in a prior habeas petition. As such, [proposed] Rule 9(b) . . . purports, for the first time in our jurisprudence, to introduce claim preclusion into the law of habeas corpus." Hearings, *supra*, at 82.

Court subsequently held in *Rose* v. *Lundy*, 455 U.S. 509, 521 (1982), Congress acted in 1976 to codify the principle set forth in *Sanders* v. *United States*.

Since 1976, there have been numerous proposals submitted to Congress to revise current law, restricting the ability of state prisoners to submit successive federal petitions. *See generally*, L. Yackle, *Postconviction Remedies* § 19 at 92 (1981); *id.* § 19, 26-27 (1986 Cum. Supp.). None have been successful.

B. Zant's Invitation: Declare A New Rule

Zant attempts to sidestep the force of this legislative history, and of the Congressional choice that it so plainly reveals, by characterizing his proposed change *not* as the judicial legislation that it plainly would be, but, more benignly, as a "clarification" of the abuse doctrine. (Pet. Br. 9). He portrays his proposed new standard as helpful "guidance . . . as to the standards federal district courts should utilize," (Pet. Br. 11), which is justified by the fact that "[t]he appropriate treatment to be given claims based on 'new law' is only briefly mentioned in Rule 9(b) itself," and "only fleetingly discussed in the Advisory Committee Notes to Rule 9(b)." (*Id.* 12).

Nothing could be further from the truth. The standards governing "new law" claims under *Sanders* and Rule 9(b) are not inchoate, awaiting further elaboration. The present rule represents a carefully considered Congressional choice, refined over a 40-year period, which balances finality interests against the interest of habeas applicants. Zant may heartily disapprove of the balance Congress has struck, but it is disingenuous for him to attribute the present state of the law to oversight or inattention.

Both the organized federal judiciary, through the Judicial Conference, and this Court, through the Rules Enabling Act, 28 U.S.C. § 2072, have participated throughout this period in a statutorily-sanctioned dialogue with Congress on the proper scope of the federal habeas writ. Zant now counsels the Court to circumvent these lawful channels, undo the work of Con-

gress, and declare its own standard. This is bad counsel, and the Court should firmly reject it.

Zant alternatively seizes upon an isolated reference in the Advisory Committee Notes to Rule 9(b)—which cites "a retroactive change in the law" as an example of a claim that does *not* constitute "deliberate withholding" or inexcusable neglect—to argue that Congress has failed to address the problem of *non*-retroactive changes, and that the Court should promulgate new habeas rules to cover such changes. (Pet. Br. 12).

Absolutely nothing in *Sanders*, in § 2244, in § 2244(b), or in Rule 9(b) suggests that the example cited in the Advisory Committee Note is other than illustrative. Different consequences simply do not flow, *as a matter of habeas corpus law*, from distinctions based upon the retroactively or nonretroactivity of new constitutional developments.[14]

Although Zant ignores the distinction, this Court has steadfastly honored the "basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). "To allow otherwise would

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[14] In a proper context, of course, the Court may choose to consider whether a particular constitutional claim, *see e.g.*, *Allen* v. *Hardy*, ___ U.S. ___, 92 L.Ed.2d 199 (1986), or even constitutional claims generally, *see e.g.*, *Griffith* v. *Kentucky*, ___ U.S. ___, 93 L.Ed.2d 649, 662-663 (1987) (Rehnquist, Ch.J., dissenting), should be given retroactive application to habeas applicants. But questions respecting the law of retroactivity are not presented by this case. Zant did not argue the retroactive/nonretroactive distinction below; arguments that Zant chose not to assert before the District Court, the panel, or the full Court of Appeals, nor to include in his petition for certiorari, should not be entertained by the Court. *See United States* v. *Taylor*, 56 U.S.L.W. 4744, 4745 n.6 (U.S., June 24, 1988); *Amadeo* v. *Zant*, 56 U.S.L.W. 4464 n.6 (U.S., May 31, 1988); *Arizona* v. *Hicks*, ___ U.S. ___, 94 L.Ed.2d 347, 357 (1987); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Irvine* v. *California*, 347 U.S. 128, 129 (1954).

confer on the judiciary discretionary power to disregard the considered limitation of the law it is charged with enforcing.'" *Bank of Nova Scotia* v. *United States*, 56 U.S. L.W. 4714, 4715 (U.S., June 22, 1988).

C. The Wisdom Of Zant's Proposed Standard

Even assuming that the federal courts were free to consider Zant's proposal on its merits, however, his arguments are unpersuasive. The "crisis" Zant describes to justify his proposed change is vastly overstated. He alleges that his proposed change is necessary to cope with the "greatly increasing numbers of successive applications by capital litigants," (Pet. Br. 9-10), who engage in "endless rounds of federal habeas corpus actions." (*Id.* 11). Zant reports that, despite this Court's admonition in *Woodard* v. *Hutchins*, 464 U.S. 377 (1984), "the district courts continue to tolerate piecemeal litigation, and more disturbingly are increasingly tolerating an entire second or even third round of post conviction proceedings that essentially revolve around the same basic issues." (Pet. Br. 10-11).

The explanation for such behavior by the district courts, according to Zant is their perplexity about "new law" claims: "[t]he federal district courts find themselves in a quandary in distinguishing between those situations in which legitimate claims are presented . . . from those claims which are simply new attempts to litigate old issues." (Pet. Br. 13).

What is the support for Zant's description of the current scene? Apart from his rhetorical flourishes, he offers no evidence to substantiate his charges. No doubt, the presence of 2000 capital inmates on the nation's Death Rows has increased the overall habeas corpus workload of the federal courts. Indisputably, many capital inmates, in the final weeks prior to their executions, attempt some last-minute legal proceedings to save themselves from execution. Yet over 80 executions have been carried out during the past five years;[15] each of those cases

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[15] *Death Row, U.S.A.*, NAACP Legal Defense & Educational Fund 3 (May 1, 1988)

demonstrates that the habeas process is far from "endless," and that federal courts, guided by this Court's opinion in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), are now routinely disposing of abusive habeas applications with dispatch. *See, e.g., McCorquodale* v. *Kemp*, 829 F.2d 1035 (11th Cir. 1987) (dismissing, in less than 24 hours, a successive petition raising "new law" claims); *In re Shriner*, 735 F.2d 1236 (11th Cir. 1984) (rejecting, on June 19, 1984, a successive petition filed in the District Court a day earlier). It is precisely the district courts' continuing ability, under the Congressional standard, to separate the meritorious from the frivolous case, the habeas 'wheat' from the 'chaff,' that demonstrates the serviceability of the modern equitable writ.

Zant's policy argument also faults the Congressional standard for its ostensible "makeshift subjective' test." (Pet. Br. 14-15). Congress indeed did decree that the inquiry on a successive petition should focus on the prior good or bad faith of the habeas applicant. There is nothing "makeshift" about this standard. Zant's real complaint is not that the standard is difficult to apply, but that, by his lights, too many habeas applicants assert "new law" claims that were not deliberately withheld on a prior application.

The attempt to use Billy Moore's case as a vehicle for attacking the Congressional standard is severely compromised, however, since the Court of Appeals itself (i) abandoned the Congressional standard, (ii) substituted a far stricter "objective" standard, and (ii) nevertheless held that Mr. Moore's claims met this heightened standard. Specifically, the majority opinion declared that a successive application on a "new law" claim may be denied *not only*—as *Sanders*, § 2244(b), and Rule 9(b) provide—if the applicant withheld a constitutional issue despite an "actual awareness of the factual and legal bases of the claim at the time of the first petition." (Pet. for Cert., A52-A53), *but also* if a "reasonably competent counsel at the time of the first petition" would have been aware of the claim. (Pet. for Cert., A53). This latter prong of the Court of Appeals' test

requires a district court to look beyond the subjective good or bad faith of the applicant to the knowledge of his counsel, and to determine, pursuant to an objective standard, whether a reasonable counsel *should have* foreseen and asserted the claim.

For the reasons identified earlier, we believe that the Court of Appeals seriously erred in adopting this objective, "reasonable counsel" standard. Yet the lower court's judgment should nevertheless be affirmed, since even under its rigorous standard, the Court of Appeals found that Mr. Moore was entitled to relief. Zant finds himself hard-pressed to explain the deficiencies of the Court of Appeals' standard, since it appears responsive to every policy concern he has asserted. The objective, "reasonable counsel" standard, indeed, seems closely modeled after this Court's standard for the consideration of "new law" claims in the procedural default context. *See Reed* v. *Ross*, 468 U.S. 1, 14-15 (1984); *Amadeo* v. *Kemp*, 56 U.S.L.W. 4460, 4463 (U.S., May 31, 1988). How can Zant seriously argue that a successive habeas applicant—whose claims are to be judged under equitable principles, with no comity interests at stake—should be subjected to a *stricter* standard than one appropriate for applicants guilty of procedural default—where comity interests are paramount, and where equity does not provide the governing framework for adjudication?

Zant's answer to this question is a confusing muddle. He variously refers to the lower court's "*subjective* test" (Pet. Br. 15) and to its "'foreseeability standard.'" (*Id.*). Either way, he claims,

> the 'foreseeability standard' in the context of an abuse of the writ case is dangerous in that it affords a way in which a petitioner can easily dismiss a properly pled assertion of abuse of the writ by merely stating that the legal principle now being asserted is a 'new claim' which was not foreseeable by counsel.

(Pet. Br. 15). This charge just won't wash. Unless a claim *is* new it can be quickly dismissed by any district court operating under the Court of Appeals' standard.

Having rejected both the Congressional standard and the more stringent Court of Appeals alternative, what finally does Zant propose as a replacement? His "workable test" would

> require that the applicant demonstrate by clear and convincing evidence that the belated claim is based on a legal foundation that did not exist at the time of the first federal petition, that this new legal foundation is not simply the product of natural development and constitutional updating in the law, and finally, that the asserted new legal foundation is in fact a substantial departure from prior legal precedent.

(Pet. Br. 18). The Court should look very carefully at this proposed test. Zant asks for "clear and convincing" proof that a legal change literally without precedent had occurred, one suddenly announced without any "legal foundation"—an opinion, in short, altogether foreign to the incremental methodology that is the hallmark of Anglo-American judicial decision-making and that, for over two centuries, has characterized this Court's approach to constitutional adjudication.[16]

It is hard to imagine *any* claim that might ever meet this standard; indeed, that seems to be the point. The radical nature of Zant's proposal reveals nothing more or less than

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[16] Such an approach would utterly transform the equitable foundations of the writ. The chief impetus for the entire development of an equitable jurisprudence in Anglo-American law was the need to mitigate "the rigid character, external and internal, which the common law soon assumed after it began to be embodied in judicial precedents," 1J. Pomeroy, *Treatise on Equity Jurisprudence* § 16, at 20 (5th ed. 1941). The Court, in fashioning its habeas jurisprudence in that spirit, has "consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalism or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley* v. *Municipal Court*, 411 U.S. 345, 350 (1973). *Accord*, *Moore* v. *Dempsey*, 261 U.S. 86, 91 (1923). Kemp's standard, deeply hostile to the principle of equity, proposes to substitute an unyielding, inflexible prohibition for the broad discretion presently vested by Congress in the lower federal courts.

how extreme and senseless must be a standard that would undercut Mr. Moore's claims.

II JUDGED BY ANY REASONABLE STANDARD, MR. MOORE DID NOT ABUSE THE WRIT IN ASSERTING HIS CONSTITUTIONAL CLAIMS

A. Mr. Moore's *Estelle* v. *Smith* Claim

Zant does not contend that Mr. Moore deliberately withheld his *Estelle* claim, or that he acted with any "purpose . . . to vex, harass or delay." He nonetheless insists that the claim be dismissed as an abuse of the writ, for two reasons. *First*, he maintains that the claim is "[b]asically . . . an attack on the circumstances surrounding the compiling of the presentence report . . . . .]. [t]he contents . . . and the circumstances [of which] have been litigated throughout Respondent's post-conviction proceedings." (Pet. Br. 19). *Second*, he maintains that the *Estelle* claim constitutes an abuse of the writ.

Zant's first contention blends one part error with one part half-truth. The error is to confound the fundamentally different issues addressed by *Estelle* v. *Smith* on the one hand, and *Gardner* v. *Florida* on the other.[17] It is only by confusing or

[17] *Estelle* focuses upon the proper conduct of a State official who interviews a capital inmate to obtain information for use in the sentencing phase of a capital case. *Estelle* establishes that Fifth and Sixth Amendment protections surround an inmate in that encounter. *Gardner* regulates a completely different stage in the criminal process—the State's submission to a sentencing court of a presentence investigation report. *Gardner* declares the Eighth Amendment and Due Process rights of a defendant to fair notice and a meaningful opportunity to respond to that report. Although a violation of both *Estelle* and *Gardner* might occasionally occur in a single criminal proceeding—as here, where officer Rachel's flawed sentencing report is a product *both* of his earlier uncounselled interview with Mr. Moore *and* of his latter failure to afford Moore and his trial attorney an adequate opportunity to review his written report—it is quite possible to have a *Gardner* violation without an *Estelle* violation, or vice versa.

ignoring the constitutional principles at stake that Zant can argue that the two constitutional issues are essentially identical, or that a habeas applicant who has asserted one claim has thereby essentially been accorded habeas review on both.

The half-truth is Zant's suggestion that Mr. Moore's *Gardner* claim has "been litigated throughout." As we have seen, while Moore did attempt to amend his initial federal petition to assert this claim, the District Court denied that amendment; thus, no federal court has ever passed on its merits. Zant urges, in effect, that Moore's *Estelle* claim should be dismissed as redundant with *Gardner*, while elsewhere urging that *Gardner* be dismissed without ever having been adjudicated on its merits by any federal court.

Zant's second and principal argument, however, centers on his new "without legal foundation" standard. His application of that standard to Mr. Moore's case is highly instructive; it underlines just how radical a revision of successive habeas law petitioner has in mind. The Court of Appeals concluded, after exhaustive analysis, that *Estelle* had not been foreseeable to reasonable counsel in 1978. (*See* Pet. for Cert., A53-A59). Petitioner dismisses that conclusion as irrelevant, however: "The proper inquiry is not one of foreseeability," (Pet. Br. 22), but whether Mr. Moore can "prove by clear and convincing evidence that this belated claim is based upon a legal foundation that did not exist . . . [and] that this new legal foundation is not simply the product of natural development." (*Id.*). Since *Estelle* cited and "relied on the much earlier decision . . . in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) . . . [and] *In re Gault*, 387 U.S. 1 (1967)," (Pet. Br. 21), "there was no substantial departure from existing law . . . such as to provide . . . a legal foundation that did not exist at the time of the first petition." (*Id.*)

Although Zant's brief began by complaining of habeas applicants who deliberately and vexatiously abused the writ, he here proposes a remedy aimed at applicants free of any bad faith conduct. Under Zant's proposed rule, a habeas applicant

would not be able to avail himself even of decisions indisputably breaking new ground and making a life-or-death difference, so long as a State attorney general could discern *some* legal foundation for the decision, some case to cite for proof that, at least by analogy, it has a lawful pedigree.

The only instance we can think of in modern criminal or constitutional law that might qualify under Zant's new standard, if adopted, would be his new standard itself: it would be utterly unprecedented, without any equitable foundation, and unanticipated (even forbidden) by prior statutes and case law holdings. For just those reasons, it should be soundly rejected by the Court.

B. Mr. Moore's *Proffitt* v. *Wainwright* Claim

Zant faces, if anything, an even more difficult problem urging the dismissal of Mr. Moore's *Proffitt* v. *Wainwright* claim. In that 1982 decision, the Court of Appeals held that a capital defendant has the right to confront and cross-examine respondents who were quoted or relied upon in a pre-sentencing report. Not only did *Proffitt* extend these guilt-phase protections for the first time to the sentencing phase, but it placed qualifications on the previous routine use of pre-sentencing reports. As the Court noted in *Gardner* v. *Florida*, 430 U.S. 349, 355-357 (1977), an important 1949 decision, *William* v. *New York*, 337 U.S. 241, 245-251 (1949), squarely held that a defendant's rights to cross-examination and confrontation did not extend to presentence reports, and lower courts had uniformly adhered to that holding.

Furthermore, in *Gardner* itself, the Court stopped short of holding that a defendant could insist on confronting respondents quoted in a presentence report; as the Court of Appeals observed in *Proffitt*, "[t]he holding in *Gardner*, narrowly viewed, simply prohibits the use of secret information'; the Court did not in that case address the scope of the capital defendant's procedural rights in attempting to rebut information that has openly been presented to the sentencing tribunal." 685 F.2d at 1254. It is in light of this history that the *Proffitt* court concluded that it was addressing "an issue of first impression in this Circuit." 685 F.2d at 1253. Even the dissenting members of the Court of Appeals in Moore's case acknowledged that "the law in this field was in a state of disarray," when Mr. Moore filed his initial federal petition. (Pet. for Cert., A107).

Under these circumstances, Mr. Moore's failure to include the *Proffitt* claim in his initial federal petition was neither deliberate nor inexcusable; nor was the claim even "foreseeable" in 1978 under the majority's objective, "reasonable counsel" standard. (*See* Pet. for Cert., A60-A61). Only measured by petitioner's "without legal foundation" standard could the Court of Appeals be faulted for directing the District Court to proceed to the merits of this claim.

C. Mr. Moore's *Gardner* v. *Florida* Claim

Unlike his *Smith* and *Proffitt* claims, Mr. Moore's contention that Officer Rachel's presentence report was submitted to the trial judge in violation of *Gardner* v. *Florida* is not a "new law" claim: its constitutional basis had been judicially recognized prior to Moore's 1977 state habeas filing. Moreover, the claim was included in Moore's state habeas petition and addressed on its merits by the state habeas court in 1978.

Ordinarily, then, the Court might anticipate that Mr. Moore, in this second federal petition, would be seeking to *relitigate* this claim. Under such circumstances, 28 U.S.C. § 2244(b) and Rule 9(b) would govern; they provide that such an application "need not be entertained," unless, as *Sanders* v. *United States* holds, "the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15. It is just such an "ends of justice" issue that was presented in *Kuhlmann* v. *Wilson*, 447 U.S. 436 (1986).

What sets this case apart, however, is that Mr. Moore *does not* seek here a second federal adjudication of his *Gardner* claim, but rather a *first* federal review. Although *Gardner* was

not initially included in Moore's federal petition, after voluntary counsel Bonner abandoned the case in midstream, Mr. Moore subsequently managed to obtain a new attorney who *did* attempt to set the *Gardner* claim before the District Court, some seven months prior to its 1981 decision on his initial petition.

Proper consideration of his *Gardner* claim, therefore, begins with the basic equitable standard articulated by this Court in *Price* v. *Johnston* and *McCann* v. *Adams*, and embodied by Congress, as we have shown above, in § 2244(b) and Rule 9(b). That standard, *Price* teaches, does not call for a rigid rule of forfeiture, but looks to the conduct of the applicant and to the surrounding circumstances on the previous application:

> [I]f for some justifiable reason [a habeas applicant] was previously unable to assert his rights . . . it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

Price v. *Johnston*, 334 U.S. at 291.

The District Court here did not reach the merits, but held the claim to be an abuse. To support its conclusions, it (i) quoted its earlier opinion, which had denied leave to amend in 1981 (Pet. for Cert. A23-A24); (ii) suggested that Mr. Moore was bound by Mr. Bonner's initial federal filing unless Bonner's performance was defective under the Sixth Amendment standards of *Strickland* v. *Washington*, 466 U.S. 668 (1984) (*see* Pet. for Cert., A24-A27); and finally, (iii) cited Mr. Moore's *pro se* motion to amend, adding the ineffectiveness claim, as evidence of Moore's "capacity as a litigator" to "raise[] sophisticated claims," on his own behalf. (*Id.* A28 n.4).

The Court of Appeals—although remanding the *Gardner* claim for consideration of the "ends of justice"—held that it could not "say that the district court . . . erred in finding that the failure to include the claim in the first petition was an abuse." (*Id.*).

Neither of these opinions, we submit, correctly applied the standards adopted by Congress; neither took proper account of

the full range of relevant circumstances. In stark contrast to the habeas applicant in *Woodard* v. *Hutchins*, 464 U.S. 377, 379 (1984), who "offered no explanation for having failed to raise these claims in his first petition," Mr. Moore has identified at least six powerful factors that both explain and excuse his conduct.

First, Mr. Moore's initial attorney was an overworked, distracted volunteer attorney who in 1978: had "approximately one hundred and fifty cases." (J.A. 189). His 7-attorney office was handling 11 capital cases, (Motion to Withdraw, at 3), and had just been judicially appointed to represent "14,00 Georgia inmates in 56 different Georgia facilities." (Motion, at 1). Bonner has acknowledged that his "office did not routinely engage in factual investigation for state post-conviction clients," (J.A. 190), which forced him to rely totally on facial constitutional attacks rather than develop issues that required knowledge beyond the record. (J.A. 190-191). As a result, Mr. Bonner's omission of the *Gardner* claim is attributable, not to any strategic judgment, but instead to his ignorance of the crucial facts—"inaccuracies or omissions in the presentence report."

Second, shortly after he filed the federal petition, Mr. Bonner formally sought to withdraw, candidly informing the District Court that "the Petitioner's right to a full collateral review of his death sentence" might be "prejudiced by the responsibilities . . . which have fallen upon his present counsel," if he continued as Moore's attorney. (Motion to Withdraw, at 3).

Third, Mr. Moore, untutored in law, did what he could to develop a record by filing a *pro se* motion to amend his federal petition. The District Court's conclusion that Moore's clumsy effort to stitch together, from other inmates' pleadings, an ineffectiveness claim somehow renders him a "sophisticated" litigator who should have appreciated the constitutional significance of a *Gardner* claim is unfounded on this record.[18]

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[18] Ironically, the District Court elsewhere expressed its ire at the "virtually automatic claim, in habeas petitions, to ineffective assistance of counsel." (Pet. for Cert., A33).

Fourth, when new volunteer counsel, Diana Hicks, did enter the case—seven months before the District Court ruled on the first petition—her behavior on Moore's behalf was exemplary. She immediately moved to amend to assert the *Gardner* claim, filed a brief explaining why the claim should be heard, rescued the case from its state of suspended animation which had followed tne untimely death of the initial district judge, prompted the District Court to reassign the case, and informed the new judge of her intentions respecting Moore's other claims. There has been no suggestion that either the District Court or Kemp suffered any prejudice from the delay between Mr. Bonner's initial federal filing and Ms. Hicks' motion to amend.

Fifth, both Moore's *pro se* motion and Ms. Hicks' motion to amend were denied by the District Court in the context of its grant of relief on another issue. Had the District Court's initial decision for Mr. Moore stood, it would have barred the State from ever resentencing Moore to death *see Blake (and Moore)* v. *Zant*, 513 F. Supp. 772, 814-818 (S.D. Ga. 1981). Relief on the *Gardner* claim, by contrast, would at most have sent the case back for further proceedings. The District Court's exercise of its discretion to deny the amendments under these circumstances hardly amounted to a finding that they should be barred under other conditions.

Sixth, under then-current principles of habeas adjudication, Moore would have been free in 1981 immediately to re-file these claims in a second petition with the District Court, *see e.g*, *Potts* v. *Zant*, 638 F.2d 727 (5th Cir. Unit B), *cert. denied*, 454 U.S. 787 (1981); *Paprskar* v. *Estelle*, 612 F.2d 1003 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980). He did not do so only because he had been given full sentencing relief by the District Court. *See Richmond* v. *Ricketts*, 774 F.2d 957 (9th Cir. 1985) (not an abuse of the writ to raise issues in a second petition when district court granted relief in initial petition on other grounds, depriving petitioner of any incentive to pursue other claims earlier).

On this cord, Judge Kravitch was surely correct in observing that Moore himself "did all he could to have the claims heard by the first habeas court." (Pet. for Cert., A40) (Kravitch, J., dissenting). As *Smith* v. *Yeager* shows, the lower courts here simply should not have saddled Moore with Mr. Bonner's omission of the *Gardner* claim from the initial petition. In *Smith*, the Court refused to attribute an attorney's *unexplained* failure to request a hearing to his habeas client, or to conclude that counsel's failure constituted a deliberate waiver of federal claims. 393 U.S. at 126. Yet here, the lower courts held Mr. Moore responsible for Mr. Bonner's omission, despite Bonner's well-documented explanation to the District Court that he was operating under circumstances that threatened the very sort of inadvertent prejudice to Mr. Moore's rights that subsequently occurred.

A holding that Mr. Moore did not abuse the writ would not only vindicate the Court's precedents; it would reaffirm sound Congressional policy as well, by rewarding precisely that conduct which petitioner purports to desire—the presentation of all available claims in an initial federal proceeding. To hold, on the other hand, that an unsuccessful attempt to amend should be treated as an abuse will obviously discourage prompt amendment and, inevitably, increase litigation in successive applications over what an applicant's counsel actually knew or should have known about developing claims.

This Court, in short, should adhere to its traditional abuse principles which encourage good faith conduct and sanction only deliberate, vexatious or inexcusable attempts to delay. Such principles create an incentive for attorneys who enter a habeas case after a petition has been filed to do exactly what Mr. Hicks did here—immediately to bring all appropriate claims to the attention of the district court.

III THE ENDS OF JUSTICE REQUIRE THE CONSIDERATION OF MR. MOORE'S CONSTITUTIONAL CLAIMS ON THEIR MERITS

Sanders makes clear that a district court has the discretion —indeed the duty—to transcend any rule of forfeiture and

reach the merits of a constitutional claim should the "ends of justice" require it. 373 U.S. at 18-19. While the principle is firm, its application can prove uncertain, as the District Court's decision here demonstrates.

This Court has addressed related applications of the "ends of justice" principle in *Kuhlmann* v. *Wilson*, *Smith* v. *Murray* and *Murray* v. *Carrier*. The teaching of those cases is that, at a the minimum, a district court should entertain claims involving a colorable showing that the asserted constitutional violations have produced a wrongful result—whether the conviction of one who is factually innocent, *Kuhlmann* v. *Wilson*, 477 U.S. at 454 (plurality opinion); *Murray* v. *Carrier*, 477 U.S. at 496, or the imposition of a capital sentence based upon a constitutional error "which precluded the development of true facts [] or resulted in the admission of false ones." *Smith* v. *Murray*, 477 U.S. at 539. Federal district courts should, under those circumstances, reach the merits even if, as in *Smith* and *Murray*, the petitioner has failed to raise the claim properly in the state courts or, as in *Kuhlmann* the federal court has previously addressed the claim on the merits.

A fortiori, a district court should do so when, as here, an applicant for the writ has neither bypassed state procedures, nor withheld the claim during the initial proceeding, nor ever had a federal adjudication of his claim on the merits.

In this case the Court of Appeals followed the lead of *Smith* v. *Murray*, applying its test to errors in capital sentencing; it inquired whether the errors in Mr. Moore's case "precluded the development of true facts . . . or resulted in the admission of false ones." [quoting 477 U.S. at 538]. It concluded that there was a "fundamental inconsistency in the decision of the district court since that court had held that the asserted constitutional violation "would have materially altered the profile before the judge." (Pet. for Cert., A65-A67).

Since Moore's case meets this most exacting standard, the decision of the Court of Appeals remanding the *Gardner* claim to the District Court for its reconsideration should be affirmed. Zant makes no responsive argument to the contrary. He does

assert that *Smith* v. *Murray* differs from the instant case by implicating issues of "comity between sovereigns" which are not presented here. (Pet. Brief pp. 28-29).

We agree. The approach articulated in *Smith* v. *Murray* resolves the tension between three sets of considerations—finality, constitutional vindication, and federalism—and advances the state's interest in compliance with its orderly procedures as well as the more general interest in finality. Second habeas petitions implicate the latter concern—finality—but not the former. Even the finality interest is contingent, since Rule 9(b) expressly permits a federal court, in the exercise of its discretion, to entertain a petition which can be characterized as abusive. For all the reasons adduced in part II (C), *supra*, these considerations call for a more generous test for the "ends of justice" than that which applies to procedural default, not a more grudging one.

Once again, Zant's extreme arguments underline the great difficulty of fashioning a standard of justice which Moore *cannot* satisfy. Unlike *Smith* v. *Murray*, the constitutional errors in Mr. Moore's case indisputably "precluded the development of true facts" and "resulted in the admission of false ones." *Id.* at 538. The presentence report contained "evidence" which was (a) inaccurate and incomplete; (b) prejudicial; (c) material; and (d) relied upon. Confronted with this reality, the District Court concluded that ". . . if attorney Pierce did fail to scrutinize the report, then sufficient likelihood would exist for a finding that a wrongful sentence was imposed based upon inadequate information." Neither Zant nor any of the judges of the Court of Appeals has challenged this conclusion.[19]

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[19] Rather, the dissenters have dealt with the danger that Mr. Moore's death sentence is erroneous either by asserting that the underlying constitutional claim is conclusively without merit—a proposition we address below—or by proposing a test that precludes consideration of a successive petition unless the applicant can establish that his claims throw into question the aggravating circum-

Factual errors and omissions abound in Moore's case because he was sentenced under circumstances not materially different from those which prevailed prior to *Furman* v. *Georgia*, 408 U.S. 238 (1973). He was sentenced in July, 1974, two years before *Gregg* v. *Georgia*, 428 U.S. 153 (1976), three years before *Gardner*, four years before *Lockett* v. *Ohio*, 438 U.S. 586 (1978), seven years before *Estelle*, eight years before *Proffitt*, and ten years before *Strickland*. These cases are the building blocks of the post-*Furman* procedural revolution which has transformed capital sentencing from a virtual afterthought lacking substantive or procedural standards to an adversarial proceeding guided by Eighth Amendment standards.

Gardner, *Estelle*, *Proffitt* and *Strickland* transpose to the sentencing phase of a capital case protections long recognized

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stances necessary to authorize the imposition of a death sentence. This latter proposal finds no support in any decided case of this Court or any other judicial authority, nor should it.

Judge Hill proceeds as though *Kuhlmann*, *Smith* and *Carrier* limited the "ends of justice" test only to those cases in which the State is unable even to make out a *prima facie* case, rather than to cases where there is a credible claim of innocence. Judge Hill's test ignores the constitutionally significant difference between the existence of evidence sufficient to make out a *prima facie* case of capital murder and the existence of facts and circumstances which would lead a sentencer acutally to impose a death sentence. This Court has insisted repeatedly on the need for procedures which permit the sentencer to choose those who deserve death from among a far larger group who are eligible by statute to receive it. *See e.g.*, *Lockett* v. *Ohio*, 438 U.S. 586 (1978); *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *Johnson* v. *Mississippi*, ___ U.S. ___, 100 L.Ed. 2d 575 (1988). From *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), on, it has been clear that death cannot be the mandatory penalty for a range of crimes, and that it is the obligation of the State to fashion the appropriate combination of procedural and substantive rules to insure that the sentencer can meaningfully choose the few who should die from among the many who should not. At a bare minimum, when, as here, it is probable that a fully and accurately informed sentencer would be unlikely to choose death, the test for ends of justice has been satisfied.

as essential to the fairness of a guilt determination. They are essential precisely because they enhance the reliability of the factfinding and law application process. In the absence of such protections, the danger of aberrant results increases substantially. In Mr. Moore's case, the danger materialized, and an aberrant capital sentence resulted.

The individual who was presented to the sentencer—a man who had attempted to carry out the very crime in question on other occasions, a man who shot first rather than responsively, a man who had no current or past personal difficulties in mitigation of his apparently gratuitous crime, a man with an extensive juvenile record, a man whom the relevant community wanted to receive a sentence of death—was a caricature. He was not Billy Moore.

Zant alternatively asserts that this Court should find what neither the District Court nor the Court of Appeals was prepared to find—that the paper record in this case allows the *Gardner* claim to be dismissed as totally lacking in merit.[20] The courts below were correct—this record does not contain sufficient evidence or findings for any reviewing court to be in a position to resolve the merits of the *Gardner* dispute.

The only factual findings made by the state habeas judge are what the transcript shows. The District Attorney introduced Exhibit 27—the 72-page presentence reports that contained Officer Rachels' error-ridden "case study." He indicated that Mr. Pierce had received a copy of this document which he characterized as "a report that was made by the Probation

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[20] Kemp asserts in his brief that the District Court dismissed the *Gardner* claim in the second petition on the grounds that it was conclusively without merit. (Pet. Br. 27). This assertion is inaccurate. The language quoted in Kemp's brief comes from the District Court's 1981 decision, which merely denied leave to amend and was *not* a resolution on the merits. When the District Court in 1984 quoted its earlier opinion, it did not purport to transform that earlier opinion into an adjudication of the merits.

Officer, Mr. Clark Rachels, which included a crime lab report" in addition to "reports and letters" from Mr. Pierce." Mr. Pierce agreed, and asked that copies of certain warrants be placed into evidence as well. The state habeas court mentioned (but made no findings respecting) the Rachels' affidavit, in which Rachels averred that he had given the entire presentence report to Pierce on the morning of the sentencing hearing, and that Pierce had asked for a brief recess in which to review it.

Several crucial gaps in the factual record are evident; they must be addressed before there can be a resolution of the *Gardner* claim. *First*, there is no finding in this record that Hinton Pierce was aware that he was in possession of the "case study" (assuming that he was). There is no finding that he ever read it. The only evidence in this record points the other way. Both by affidavit to the Georgia Supreme Court and by live testimony under oath, Hinton Pierce insisted that he had never seen a probation officer's report of a presentence investigation in any Georgia case, and he had not seen the case study in this case. (J.A. 108-09)[21] Pierce's failure to make *any comment of any nature* about the report supports the "logically compelling inference," *United States* v. *Harris*, 558 F.2d 366, 376 (7th Cir. 1977), that he never read it. ". . . [T]here is no basis for presuming . . . that counsel could possibly have made a tactical decision not to examine the full report." *Gardner* v. *Florida*, 430 U.S. at 361 (plurality opinion). We suggest that he never read it

[21] Rachels asserted that Pierce showed the report to Moore in Rachels' presence and asked Moore if the "personal statement" (not otherwise identified but apparently the transcript of Moore's confession to the police) was accurate. (J.A. 106) This account seems implausible. If Pierce had been aware that he had been given the results of a confidential "case study," it makes no sense that neither he nor Moore noticed the numerous inaccuracies concerning Moore's marriage, his financial circumstances, his juvenile record, and the circumstances of the crime. It is more plausible to conclude that Pierce, on July 17th, did not see or examine the Rachels "case study" amid the larger, 72-page report.

because he never realized that he had it. On the record as it now stands, there is no way of knowing.

Second, the record does not contain evidence as to whether Pierce, if he did have the case study, was afforded a meaningful opportunity to review and comment upon it. There is no finding on this point, and what little evidence there is points toward the lack of any meaningful opportunity. Rachels asserted that after he provided the presentence report to Pierce on the morning of the sentencing hearing, Pierce requested a brief recess. (J.A. 106). No request for a recess appears on the record. The entire trial (J.A 18-72) was completed in time for Judge McMillan to take a recess for lunch and schedule closing arguments for 2:00 p.m. This sketchy data suggests that Pierce could not possibly have had sufficient time to carefully review the seventy-two page document, identify the case study, read it, discuss it with Moore, and decide how to respond. *United States* v. *Robin*, 545 F.2d 775 (2d Cir. 1976) (receiving lengthy presentence report on the morning of sentencing provides inadequate opportunity in guilty plea case); *Barclay* v. *State*, 362 So.2d 657 (Fla. 1978) (when record does not reveal the existence of a meaningful opportunity to examine and comment, remand is required); *State* v. *Phelps*, 297 N.W. 2d 769 (N.D. 1980) (thirty minutes is inadequate).

Third, there is no finding that Mr. Moore saw the case study. There is no evidence in the record to support such a finding. Mr. Moore testified that he had never seen the report. (State Habeas Transcript, at 18). Logic again supports his assertion —it passes belief that the grossly misleading "rap sheet," at least, would not have caught his eye and elicited his protest. The right involved here is that of Mr. Moore, and not his counsel. *Gardner* v. *Florida*, 430 U.S. at 361. There is nothing in the record to suggest that he waived it.

To the extent that it is possible to piece together a coherent story from these fragments of evidence, the tale that emerges is one of constitutional violation, not vindication. The Circuit

Court correctly concluded that this case must be remanded to the district court in order to resolve these issues.[22]

Where this Court were to reverse the Court of Appeals' disposition of the *Estelle* and *Proffitt* claims and rule that the effort to raise them was an abuse of the writ, those claims would require identical treatment. Many of the factual inaccuracies reported in the Rachels "case study" are apparently attributable to Rachels' interview with Moore, conducted in violation of *Estelle*. None of the evidence contained in the case study was presented in open court by witnesses under oath and subject to cross-examination. Were there a reversal, the District Court should still decide whether the ends of justice mandate full consideration of these claims.

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[22] There is no question but that Mr. Moore suffered a fundamental violation of his due process and Eighth Amendment rights, *Townsend* v. *Burke*, 334 U.S. 736 (1948); *Johnson* v. *Mississippi*, 100 L.Ed.2d 575 (1988). The only question is exactly how such errors occurred. Under these circumstances, any remand should also direct the District Court to consider the possibility that Mr. Moore received the ineffective assistance of counsel. As the Eighth Circuit observed in a comparable situation, "If the report is untrue, and if there was no opportunity afforded Ryder or his attorney to rebut the inaccuracies, the sentence may be invalid . . . If, on the other hand, Ryder's attorney failed to avail himself of opportunities to discover the substance of the report, and to develop and present rebuttal material, either at the sentencing hearing, or to advise Ryder of the necessity of presenting exculpatory evidence, it is possible that Ryder received ineffective assistance of counsel." *Ryder* v. *Morris*, 752 F.2d 327, 332 (8th Cir. 1985).

CONCLUSION

The judgment of the Court of Appeals should be affirmed, or alternatively, the Court should modify the judgment, holding that Mr. Moore did not abuse the writ with respect to any of his constitutional claims.

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